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No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

VICKI LOPEZ-LUKIS,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

# PETITION FOR WRIT OF CERTIORARI

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**August 3, 1999**

133rd

## QUESTIONS PRESENTED

1. Whether, in an "honest services" mail fraud prosecution of a public official under 18 U.S.C. § 1346, the district court must instruct the jury on the meaning of a public official's "honest services" in her "official capacity."

2. Whether a public official's "honest services" under 18 U.S.C. § 1346 include discussions with reporters about the public official's private life, or whether, instead, those services are limited to the public official's votes, decisions, and other official actions on matters involving public business.

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of the case, Sylvester Lukis, petitioner's husband, was also a defendant at trial. Mr. Lukis was charged in the same indictment as Mrs. Lukis and was acquitted by the jury on all counts.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Vicki Lopez-Lukis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit below.

## OPINIONS BELOW

The original one-word order of the court of appeals affirming the conviction (App. 1a-2a) was entered on January 27, 1999 and is not reported. The court of appeals' subsequent opinion and order on rehearing (App. 3a-10a) was entered on May 5, 1999 and is also unreported. The colloquies in mid-April, 1997 in which the district court refused to instruct the jury on the meaning of petitioner's "honest services" in her "official capacity," and the resulting "honest services" fraud instructions issued to the jury (App. 32a-46a) are part of the record below and are not separately reported.

## JURISDICTION

The court of appeals entered its judgment on May 5, 1999. App. 3a-10a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The statute at issue is 18 U.S.C. § 1346. That statute was added to the United States Code in 1988 for the purpose of overruling in part this Court's decision in *McNally* v. *United States*, 483 U.S. 350, 356 (1987), which had held that mail or wire fraud schemes must have as their object the deprivation of money or property. Section 1346 provides in full:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

## STATEMENT OF THE CASE

The question presented in this case is whether public officials prosecuted under the mail fraud statute for deprivation of "honest services" are entitled to a jury instruction limiting the scope of criminal liability under that statute to matters involving official conduct and governmental decisionmaking. The decision below, in contrast with decisions of other federal courts of appeals, affirmed a mail fraud conviction of a former state official based upon jury instructions that permitted an "honest services" conviction to rest upon misrepresentations to the media and constituents regarding the official's private life.

The statutory terms "honest services" and "official capacity" demarcate the line between conduct that is merely dishonest and that which constitutes the specialized form of fraud made criminal by 18 U.S.C. § 1346. In affirming petitioner's conviction, the Eleventh Circuit refused to limit convictions under the mail fraud statute to conduct that clearly falls within the plain meaning of the statutory terms. In fact, it was only after well-publicized criticism of the decision below, including a front-page feature story in the *New York Times*, that the court issued any opinion at all, and that opinion still failed adequately to address the statutory interpretation issue at the heart of this case.

The Eleventh Circuit's ruling allowed petitioner to be found guilty of "honest services" mail fraud and imprisoned without any instruction defining "honest services" and based upon the jury's legally erroneous belief that lying to the press about a love affair amounts to a deprivation of a public official's "honest services" within the meaning of 18 U.S.C. § 1346. In so doing, the decision below conflicts with the "honest services" rulings of other courts of appeals, which insist upon detailed instructions on the meaning of these specialized legal terms. The judgment below thus warrants review by this Court because

of this important disparity in the circuits. Indeed, the Eleventh Circuit "so far departed from the accepted and usual course of judicial proceedings, [and] sanctioned such a departure by a lower court, as to call for an exercise this Court's supervisory power." Sup. Ct. R. 10(a).

1. Petitioner Vicki Lopez-Lukis and her husband, Sylvester Lukis, were tried together before a jury on 10 counts of bribery-related charges.[1] Following a two-week trial involving 41 witnesses (including both defendants) and hundreds of exhibits, Mr. and Mrs. Lukis were acquitted of 21 of the 22 counts submitted.[2] The sole exception was the mail fraud charge against petitioner in Count One of the indictment. That charge alleged that she and her husband devised a scheme to defraud the citizens of Lee County, Florida, "of their intangible right to the honest services of [Mrs. Lukis] in her official capacity as Lee County Commissioner." App. 18a.

This count of the indictment was brought under 18 U.S.C. §§ 1341 and 1346. Section 1341 is the general mail fraud statute, which makes criminal any "scheme or artifice to defraud" that involves the use of the mails. Section 1346 is a specialized adjunct to that statute, which expands the schemes eligible for prosecution to include certain schemes that do not have as their object the taking of money or property.

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[1] Mr. and Mrs. Lukis were indicted on March 10, 1995 in an eleven-count indictment which charged one joint count of "honest services" mail fraud under 18 U.S.C. §§ 1341 and 1346; one count each of bribery under 18 U.S.C. § 666; and eight joint counts of using a facility in interstate commerce to commit bribery in violation of the Travel Act, 18 U.S.C. §§ 2 and 1952. App. 11a-24a.

[2] The district court erroneously submitted eleven counts against each defendant to the jury on the verdict form, presumably because it failed to notice that two of the eleven counts in the indictment (counts 2 and 3) each charged only one of the two defendants.

Cf. *McNally* v. *United States*, 483 U.S. 350, 356 (1987) (holding that § 1341 encompasses only schemes to deprive another of money or property). In prosecutions against public officials, § 1346 operates to criminalize bribery, kickbacks, and other actions that deprive the public of its "intangible right of honest services," 18 U.S.C. § 1346, *i.e.*, its right to have public officials refrain from "undisclosed, biased decisionmaking for personal gain." *United States* v. *Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996).

2. The "honest services" mail fraud charge against Mr. and Mrs. Lukis in Count One was based on the same essential allegation that underlay each of the other counts of the indictment: bribery. The payments at issue were a series of financial gifts Mr. Lukis made to petitioner during the spring and summer of 1991, at a time when she was a County Commissioner in Lee County, Florida, and he was a lobbyist with two clients who had interests before the Lee County Board of County Commissioners ("BOCC" or "the Board"). As authoritatively construed in a pretrial appeal, the gravamen of the charge in Count One was that Mr. Lukis "paid [petitioner] for political favors," including "her vote on key matters" affecting his clients and "her influence to deliver a majority of the Board's votes on those matters." *United States* v. *Lopez-Lukis*, 102 F.3d 1164, 1168 (11th Cir. 1997).

At the time of Mr. Lukis's gifts to petitioner, they were not married but were involved in an intimate personal relationship with one another, which both of them preferred to keep private. Petitioner was then 33 years old, unmarried, and approximately four months into her first term as a Republican Commissioner on the Lee County Board. Mr. Lukis was a successful Washington-based lobbyist who was married to another woman. With the exception of a few months in the spring and summer of 1992 during which they were estranged, the Lukises remained romantically involved until she resigned

from the BOCC in January 1993. At that time, petitioner moved to Washington, D.C., where she and Mr. Lukis were later married. Their defense at trial was that the gifts in question were made in the course of their romantic relationship and were unrelated to petitioner's duties as a Commissioner.

a. The financial gifts principally at issue in the trial were a series of seven small checks, ranging from $200 to $1,000, and totaling $4,032.[3] The checks were written between May 6, 1991 and August 22, 1991 at irregular intervals and in irregular amounts. They were not written to petitioner; instead, Mr. Lukis made out the checks to a friend of hers, who cashed them and provided the funds to petitioner.

Mr. and Mrs. Lukis never disputed that Mr. Lukis made the payments in question or that they were intended to be, and were, passed along to petitioner. Both defendants explained without contradiction that the payments were reimbursements for bills petitioner incurred in making personal phone calls to Mr. Lukis and other expenses related to their personal relationship, such as a security deposit on an apartment they shared. This testimony was supported by extensive documentation of the associated expenses. Both Mr. and Mrs. Lukis denied that the payments had anything to do with County business or that they were ever intended to influence petitioner's performance of her duties as a County Commissioner. They explained that the payments were made through a third party to help conceal their relationship from Mr. Lukis's then-wife.

b. The prosecution adduced no direct evidence that the payments in question were bribes or were given or received

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[3] The prosecution also cited Mr. Lukis's payment of some of petitioner's credit card bills and other expenses in the early months of 1993, after she was no longer a County Commissioner and she and Mr. Lukis had established a household together in Washington, D.C., and were engaged to be married.

with any unlawful intent. Not a single witness so testified, and no document cast doubt on the proposition that Mr. and Mrs. Lukis intended these payments to reimburse personal expenses unconnected to any of petitioner's official duties. Instead, the prosecution's case was based entirely on contentions about petitioner's conduct in office, which the prosecution claimed reflected a bias in favor of two of Mr. Lukis's clients: Ogden Projects, Inc. ("Ogden"), a New Jersey-based builder of waste-to-energy trash incinerators, and Goldman Sachs ("Goldman"), a Wall Street investment bank that wished to underwrite municipal bonds in Lee County.

c. With respect to each of Mr. Lukis's clients, the record of petitioner's official actions revealed that she had not consistently favored their interests and that her voting bore little relation to the dates of her romantic relationship with Mr. Lukis or to his gifts to her. She had taken actions that both helped and hurt Mr. Lukis's clients during the period when they were romantically involved, and she had done the same thing during their separation. And while the first telephone bill reimbursement occurred shortly after a vote on the incinerator matter, at other times, petitioner took actions distinctly unfavorable to Mr. Lukis's clients in close temporal proximity to a gift. For example, petitioner voluntarily resigned her position on Lee County's Bond Selection Committee, which was responsible for selecting underwriters of municipal bonds, the very same day she received the proceeds of the $1,000 check (the largest of the group) for the security deposit from Mr. Lukis.

Moreover, the actions she took that were favorable to Ogden and Goldman were all based on sound considerations of public policy that petitioner had articulated before she even met Mr. Lukis. Indeed, with respect to every vote petitioner cast that even arguably benefitted Mr. Lukis's clients, the Board as a whole also voted in favor of Mr. Lukis's clients either

unanimously or by a supermajority. The only time petitioner's vote was decisive, she voted contrary to the interests of Mr. Lukis's client.

d. Although evidence of bribery was scarce, evidence of misrepresentations regarding the relationship between Mr. and Mrs. Lukis was abundant. Throughout the period in question, Mr. and Mrs. Lukis had gone to great lengths to keep their relationship secret. With the exception of their closest friends, Mr. and Mrs. Lukis told no one of their romance. Thus, when asked about the relationship in writing by a reporter for the Fort Myers News-Press, Lee Melsek, in August 1991, petitioner provided a response stating falsely that she had no personal relationship with Mr. Lukis.

In addition, petitioner lied about her involvement in what came to be known as "the videotape incident." This incident involved petitioner's distribution of a videotape made by a private detective that showed Susan Anthony, a married woman running for a seat on the BOCC, cavorting late at night with a lawyer-lobbyist, Bruce Strayhorn, whom petitioner also was dating at the same time. The Eleventh Circuit in a pretrial appeal ruled that this incident was potentially relevant to the bribery allegations in Count One, but only insofar as it might be shown to have been part of an effort to affect the composition of the BOCC in favor of Mr. Lukis's clients by securing the electoral defeat of an anti-incinerator candidate such as Mrs. Anthony. See *Lopez-Lukis*, 102 F.3d at 1170.

The evidence at trial established beyond dispute that the making and release of the videotape had nothing to do with any such effort. Every witness with whom petitioner had contemporaneously discussed this incident confirmed that she acted out of personal animus against Mr. Strayhorn, whom she believed had betrayed her by carrying on an affair with Mrs. Anthony. In her testimony, petitioner admitted her role in the

incident and acknowledged that she had lied about both the incident and her relationship with Mr. Lukis to various friends, acquaintances, business associates, and reporters.

3. Given the evidence, it was critically important for the jury instructions to make clear that the deprivation of "honest services" charged in Count One did not refer to ordinary dishonesty but rather to the special form of dishonest conduct -- accepting money to corrupt judgments and votes about official business -- made criminal by § 1346. Petitioner requested a jury instruction that would have provided this definition, but it was not given.[4] After the district court drafted an instruction that contained no definition of the term "honest services," petitioner proposed a supplemental instruction to cure the defect.[5] She

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[4] The original proposed instruction read:

> To "defraud the citizens of Lee County of their intangible right to honest services" means that Mr. and Mrs. Lukis must have devised a scheme to influence Mrs. Lukis's performance of her official functions, so that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners. In particular, in order to return a guilty verdict on this count, you must first find that the prosecution has proven beyond a reasonable doubt that Mr. and Mrs. Lukis devised a scheme whereby Mrs. Lukis would solicit, and Mr. Lukis would give, financial payments based on an understanding that Mrs. Lukis's actions as a County Commissioner would be influenced by such payments.

App. 27a.

[5] This instruction read:

> I caution you that it is not sufficient for conviction to conclude that the defendants engaged in a scheme, as I have
>
> (continued...)

argued that such an instruction was needed to explain "what honest services refer to," because "[i]t may not be obvious to the jury that that means bribery." App. 33a; see *id.* ("somewhere we would like your Honor to instruct the jury what a scheme to defraud of honest services means"). At the final charge conference, counsel once again requested "one sentence or two sentences, just making clear that the object of the scheme is the deprivation of honest services, and what that means." *Id.* at 34a. Counsel explained:

> I just want to make absolutely sure that the jury understands that the term, "honest services," refers to the integrity with which she performed her official duties, and not whether she was honest or dishonest in general, because I think it's not disputed that she was dishonest in a number of respects . . . .

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[5] (...continued)

> just defined it for you. Instead, in order to be found guilty of the honest services mail fraud charged in Count One, Lukis and Lopez-Lukis must have devised a scheme whose object is the same as that alleged in the indictment. The sole object of the scheme charged in Count One is "to defraud the citizens of Lee County of their intangible right to [Lopez-Lukis's] honest services" by making financial payments to her. To "defraud the citizens of Lee County of their intangible right to honest services" means that Lukis and Lopez-Lukis must have devised a scheme to influence Lopez-Lukis's performance of her official duties as Lee County Commissioner through the making of illegitimate payments to her, such that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners.

App. 30a.

*Id.* at 34a-35a.

The district court again rejected the request. The jury was instructed only that it had to find that Mr. and Mrs. Lukis "knowingly and willfully devised a scheme to defraud the citizens of Lee County of their intangible right to Lopez-Lukis' honest services in her official capacity." App. 45a. No definition of honest services or official capacity was provided.

The dispute between the United States and petitioner over the definition of these statutory terms was carried through in the closing argument. Petitioner argued that a conviction on Count One could rest only upon a finding that she had acted corruptly in voting on or conducting County business. The United States, by contrast, argued that petitioner failed to render "honest services" to the citizens of Lee County by lying to reporter Lee Melsek and others about her relationship with Mr. Lukis and her involvement in the videotape incident: "the honest thing, the proper thing was to disclose the relationship before the first vote, before the first official act . . . . That disclosure, that revealing of the relationship, that would have been honest services." App. 50a.

The closing argument by the United States -- which invited the jury to convict petitioner based upon misrepresentations to constituents and media about her relationship to Mr. Lukis -- was objected to shortly after the jury retired, on the ground that petitioner was:

> fearful that this jury is taking from that rebuttal argument and the fact that the instructions really never defined honest services, a feeling that if they find that she was not candid and honest about the relationship, which she lied about and didn't tell the Lee County voters [about], that that qualifies as a predicate for conviction under Count One.

App. 37a. Petitioner again asked for a short, curative instruction to explain the meaning of "honest services" and eliminate any possibility of confusion. The district court only again denied the request. *Id.* at 42a.

4. The only count on which the jury convicted petitioner was Count One -- the precise outcome that she expressly predicted would occur in light of the misleading argument of the United States and the absence of any instruction on the "honest services" element of the offense. Juror interviews made clear that the absence of the requested instruction caused the conviction:

> "The state did not prove the bribery charges at all," said [juror] Joan Hermanns of Cape Coral. . . . Hermanns said jurors became convinced the money that changed hands between Lopez-Lukis and Lukis were not bribes but gifts related to the couple's romance. . . . Hermanns also said jurors convicted Lopez-Lukis of mail fraud because she lied to a reporter.
>
> "It was the only indictment we had proof of," Hermanns said. "She lied in the questions she filled out for the news reporter."

App. 52a. Another juror, Arthur Hohmann stated that:

> "We couldn't find one iota of proof that a crime was committed. . . . We had one juror that said she must be guilty of something or they wouldn't have gone to all this trouble. This thing would have been hung, so we found she lied to some reporter based on something she mailed."

*Id.* at 58a. The newspapers also reported that Mr. Hohmann "said there was confusion among the jurors as to the elements of the charge." *Id.* at 56a.

5. Petitioner's principal contention on appeal was that the district court had erred in refusing her repeated requests to instruct the jury on the meaning of "honest services" in her "official capacity." The Eleventh Circuit affirmed by unpublished opinion. That opinion stated in its entirety: "Affirmed." App. 2a.

Petitioner promptly filed a petition for rehearing and suggestion for rehearing *en banc*, reiterating her arguments on the merits and claiming in addition that the panel's terse, unpublished order constituted an abuse of Eleventh Circuit rules governing unpublished opinions. Petitioner argued that "the district court's refusal to provide any definition of the phrases 'honest services' and 'official capacity' left the jury free to convict her for misstatements to the media regarding her personal life and, in particular, her romantic involvement with the man who later became her husband." Appellant's Petition for Reh'g 2. She contended that such misstatements do not constitute a deprivation of "honest services" within the meaning of 18 U.S.C. § 1346, and that a written opinion to the contrary by the panel "would have conflicted with the rulings of other courts of appeal and may have been worthy of certiorari." *Id.* at 3.

The National Association of Criminal Defense Lawyers filed a brief as *amicus curiae* in support of rehearing. And the *New York Times* ran a lengthy, front-page feature article discussing the case and the Eleventh Circuit's leading role in developing a "'two-track [justice] system'" in which many "litigants are quickly losing the right to meaningful appeals." The *Times* article observed that "sketchy rulings may sometimes be used by judges who want to reach a certain legal result but

are not anxious for their decision to be scrutinized." App. 63a, 64a, 68a.

In response, the Eleventh Circuit issued an amended order, which was also unpublished. App. 3a-10a. In this *per curiam* order, the Eleventh Circuit defended the legitimacy of its decision to resolve the appeal without a written opinion and the propriety of its affirmance.[6] In so doing, however, the Eleventh Circuit never addressed whether the jury instructions adequately apprised the jury of the meaning of petitioner's "honest services" in her "official capacity." Instead, the court mischaracterized the issue on appeal, treating the case as a sufficiency-of-the-evidence challenge.

Without ever acknowledging that the jury instructions never defined what petitioner's "honest services" or "official duties" included -- which was the core problem she had repeatedly tried to present to both the district court and the court of appeals -- the court stated that "[t]he jury instructions emphasized that the government must prove that appellant solicited or accepted benefits with the intention of being influenced in her *official* duties," and that "[t]here was ample evidence to support the jury's verdict that defendant accepted benefits to influence her in her *official* actions." App. 6a. The latter points entirely beg the question: even if it were true (and it is not) that the instructions required, and the evidence supported, a finding that petitioner had an intent to be influenced in her official actions, the issue on appeal was whether a guilty verdict could be allowed to stand where the instructions never explained for the jury what "official actions" a public official such as petitioner must dishonestly perform in order to be convicted under 18 U.S.C. § 1346. The critical

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[6] The Eleventh Circuit explained that "[t]o reasonable lawyers who know the case and who think hard about our decision, the meaning of a Rule 36-1 affirmance is understandable." App. 9a.

question for the jury, which was never answered in the jury instructions, was whether petitioner's "honest services" included only her votes and other decisions affecting County business, as the defense had contended, or whether they also included radio interviews and written press statements, as the prosecution had argued and which had served as the actual basis for conviction. Through judicial sleight of hand, the decision below thus approved the use of jury instructions that left a critical element of the "honest services" fraud offense undefined.

## REASONS FOR GRANTING THE PETITION

This case presents unresolved questions of fundamental importance concerning the proper interpretation of the "honest services" mail fraud statute, 18 U.S.C. § 1346, on which the courts of appeals have taken inconsistent positions. In particular, the Eleventh Circuit, contrary to established practice in the First and Seventh Circuits, has affirmed the "honest services" mail fraud conviction below despite the absence of any instruction to the jury on the meaning of the phrases "honest services" and "official capacity." Without such an instruction, the prosecution was allowed to argue in summation, and the jury was left free to accept in its deliberations, that petitioner was guilty of "honest services" fraud based on conduct she had admitted on the stand: lying to the press and the public about a love-affair with her now-husband. Review of this decision is necessary to ensure the legally correct, nationally uniform application of this important public corruption statute, which this Court has not yet addressed.

## I. REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS REGARDING THE INTERPRETATION OF, AND JURY INSTRUCTIONS GOVERNING, THE TERMS "HONEST SERVICES" AND "OFFICIAL CAPACITY."

1. Through use of its *per curiam* affirmance rule and subsequent mischaracterization of the primary issue on appeal, the Eleventh Circuit avoided issuing a published opinion that on its face would have conflicted with existing decisions in other circuits on a question of extraordinary importance: whether a district court must define for lay jurors the critical phrases "honest services" and "official capacity," which together describe the essence of the conduct made criminal by § 1346. Because numerous circuits -- other than the Eleventh Circuit -- require jury instructions regarding the specialized meaning of a public official's "honest services," there is an important split in circuit law and practice affecting the fundamental rights of persons accused of "honest services" fraud.

Lacking clear guidance from this Court, lower courts have been struggling, in the context of mail fraud prosecutions against public officials, over whether and how to define for the jury the public's right to an official's "honest services." Not surprisingly, many lower courts have provided jury instructions that cannot be reconciled with those the Eleventh Circuit approved below or, for all practical purposes, with each other. Had petitioner stood trial in another circuit, where the right to a jury instruction on the meaning of these legal terms is established, the outcome of this case would have been different.

Here, the district court's instructions -- which were approved silently by the Eleventh Circuit -- contained no definition whatsoever of the phrase "honest services in her

official capacity." The closest the instructions came to apprising the jury of the legal line between "honest services" fraud and generalized dishonesty was a single sentence at the end of the definition of "intent to defraud."[7] That sentence read: "[T]o find that defendant Lopez-Lukis had the required intent to commit honest services fraud, you must find that she solicited or accepted benefits with the intention of being influenced in her official duties." App. 46a. Because the instruction did not define the "official duties" that must be involved in an "honest services" fraud scheme, it allowed the jury to accept the government's erroneous argument that radio interviews and press responses constituted the "official conduct" at issue and thereby convict petitioner of "honest services" fraud for denying her relationship with Mr. Lukis when asked by the media.

In contrast to the absence of instructions upheld by the Eleventh Circuit below, the First and Seventh Circuits have strongly and unequivocally required district courts to inform criminal juries about the precise meaning of "honest services." In *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996), the First Circuit reversed a lobbyist's conviction for "honest services" fraud because the instructions failed to instruct the jury properly concerning the difference between "reprehensible misconduct" and "criminal misconduct." *Id.* at 725; *id.* at 741 ("where, as here, the line between the merely unattractive and actually criminal conduct is blurred, the court must take pains to explain the difference to the jury"). The First Circuit mandated that the district courts use a protective instruction in

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[7] The instructions also contained one sentence in the preamble to the Count One instruction which stated that the alleged scheme involved "influencing Lopez-Lukis' performance of her official duties [through] defendant Lukis' illegitimate payments to her." App. 45a. But this general description of the charge did not illuminate what petitioner's "official duties" included or explain the difference between corrupt official decisionmaking and merely dishonest or disappointing conduct by a public official.

such cases. *Id.* at 742.[8] Thereafter, the First Circuit incorporated this requirement into its pattern jury instruction for mail fraud. See *First Circuit Pattern Jury Instructions (Criminal Cases)*, Inst. 4.12 cmt (3) (1998) ("Schemes to deprive others of the intangible right of honest services are included by virtue of 18 U.S.C. § 1346. For a lengthy discussion of the scope of this phrase, see [*Sawyer*]").

The instructions delivered in the sequel to *Sawyer*, *United States* v. *Woodward*, No. 97-1429 (D. Mass. 1998), underscore the irreconcilable difference between the jury instructions required by the First Circuit and those given in petitioner's trial and upheld by the Eleventh Circuit. In that case, the government accused Francis H. Woodward, a former member of the Massachusetts House of Representatives, of, among other crimes, depriving his constituents of his "honest services" by accepting certain illegal gratuities from William Sawyer, a senior legislative counsel in the government relations department of John Hancock Mutual Life Insurance Company. The district court's instructions, which elaborated on the precise meaning of "honest services" provided, in pertinent part, that:

> Now, there are two sub-elements that the Government must prove when they make the charge that there has been a scheme or artifice to defraud by a deprivation of honest services. . . . First, the Government must show that the public official accepted gratuities -- and

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[8] As support, the First Circuit cited the Second Circuit, which made the same recommendation in an analogous context: "When an elected official who has received campaign contributions is charged with extortion and with receiving bribes, the charge must carefully focus the jury's attention on the difference between lawful political contributions and unlawful extortionate payments and bribes." *United States* v. *Biaggi*, 909 F.2d 662, 695 (2d Cir. 1991).

> we use "gratuities" generally as things of value that we'll define more specifically as we go along -- knowing that the gratuities were offered to influence or otherwise improperly affect his official action. *The focus here is on the intent of the defendant to accept a gratuity, actually to influence his official duties, to cause him to depart from his duty to act as a disinterested legislator or legislative decision-maker*. . . . The ultimate concern of this sub-element is, I think, clear. *It focuses on whether or not the legislator is exercising his independent judgment in passing on official matters. If the official has been paid by someone or some entity other than the public in connection with his duties, there is a concern that he will make decisions without considering the merits of the matter, regardless of the public interest, and thereby deprive the public of honest and faithful services.*

App. 79a (emphases added). Although the jury convicted Woodward and the First Circuit affirmed, see *United States* v. *Woodward*, 149 F.3d 46, 51 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1026 (1999), it is indisputable that the instructions mandated by the First Circuit cannot be reconciled with the refusal of the panel below to mandate a definition of "official duties."

The Seventh Circuit also commands the use of such instructions. See *Federal Criminal Jury Instructions of the Seventh Circuit* 261 (1999). Two recent, high-profile "honest services" fraud cases, *United States* v. *Santiago*, No. 97-CR-441 (N.D. Ill. 1998), and *United States* v. *Bolden*, No. 97-C-0218 (N.D. Ill. 1999), illustrate the type of detailed instructions

provided in the Seventh Circuit on "honest services" which repeatedly were requested -- but denied -- in this case.

In *Santiago*, the government indicted Miguel A. Santiago, a member of the Illinois General Assembly, and others for engaging in a ghost pay rolling scheme at the Cook County Treasurer's Office ("CCTO"). Specifically, the indictment alleged that Santiago received approximately $137,000 in wages from the CCTO payroll for clerical work he did not perform. In its instructions, the district court informed the jury that "honest services" fraud does not encompass every form of ethical lapse or dishonest conduct by public officials or employees. Rather, the District Court for the Northern District of Illinois emphasized that Santiago committed "honest services" fraud only if he violated his "fiduciary duty" to Cook County residents to conduct the County's business fairly and unfettered by corruption or fraud. See App. 81a-83a.

In *Bolden*, the government accused John R. Bolden, the Commissioner of the Department of Water for the City of Chicago, of depriving the City and its citizens of his "honest services" by, among other things, accepting bribes in return for assisting a construction company to obtain work from the city. In contrast to petitioner's case, the District Court for the Northern District of Illinois clearly instructed the jurors as to the applicable principles of law, namely, that it could convict him of "honest services" fraud only for political corruption and not for other forms of misbehavior. To convict Bolden for "honest services" fraud, the jury was instructed that it must find he acted "knowingly and with the intent to deprive the City of Chicago and its citizens of their rights to [his] loyal and faithful services in the performance of *acts related to his public employment*, and their rights to have him *make decisions in his official capacity as Water Commissioner* free from corruption,

dishonesty, bribery and fraud." See App. 88a (emphasis added).[9]

2. This conflict in the circuits produces intolerable inconsistency in an area -- federal prosecution of state and local public officials -- in which national uniformity is peculiarly important. Because of the irregular means by which the Eleventh Circuit chose to resolve this case,[10] there is of course no acknowledged conflict between the published reasoning of the Eleventh Circuit and the other courts of appeals. This factor does not counsel against certiorari, however. In addition to the clear conflict in instructional practice among the circuits, the interpretation of federal criminal statutes has often been thought to warrant consideration by this Court, even in the absence of a circuit conflict. Indeed, this Court's seminal decision on "honest services" mail fraud, *McNally* v. *United States*, 483 U.S. 350 (1987), is perhaps the most notable example. Notwithstanding the long-standing, unanimous interpretation by the lower courts of the mail fraud statute, this Court granted certiorari to review the broad application of the intangible rights doctrine to prosecutions of various public officials and private

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[9] Although there are no District of Columbia Circuit pattern jury instructions, the District Court for the District of Columbia also routinely instructs on the meaning of "honest services." The district court's instructions in *United States* v. *Espy*, No. 97-0335 (RMU) (D.D.C. 1998), also illuminate the disuniformity in lower court practices. *See* App. 90a-97a.

[10] In addition to the *New York Times* article, the Eleventh Circuit's penchant for giving short shrift to certain categories of appeals has prompted recent commentary. *See* William C. Smith, *Big Objections to Brief Decisions*, ABA Journal, Aug. 1999, at 34 (stating that the Eleventh Circuit "leads the circuit courts in issuing decisions that have not included written opinions, with 502 such rulings last year"); app. 69a-75a.

fiduciaries.[11] See *id.* at 379 (Stevens, J., dissenting) (noting the unanimity of the circuits on the precise question considered). It was this decision that prompted passage of § 1346, which this Court has thus far had no opportunity to construe in the eleven years since its passage. In comparison to *McNally*, this case presents a demonstrable conflict and a far more compelling case for certiorari.[12]

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[11] Prior to this Court's *McNally* decision, *all* of the courts of appeals had recognized the intangible rights theory of the mail fraud statute. *See United States* v. *Silvano*, 812 F.2d 754, 759 (1st Cir. 1987); *United States* v. *Margiotta*, 688 F.2d 108, 121-22 (2d Cir. 1982); *United States* v. *Boffa*, 688 F.2d 919, 926 (3d Cir. 1982); *United States* v. *Mandel*, 591 F.2d 1347, 1358-64 (4th Cir.), *aff'd en banc in relevant part by an equally divided court*, 602 F.2d 653 (4th Cir. 1979); *United States* v. *Curry*, 681 F.2d 406, 411-12 (5th Cir. 1982); *United States* v. *Gray*, 790 F.2d 1290, 1294-96 (6th Cir. 1986), *rev'd*, 483 U.S. 350 (1987); *United States* v. *Isaacs*, 493 F.2d 1124, 1150 (7th Cir. 1974); *United States* v. *States*, 488 F.2d 761, 765 (8th Cir. 1973); *United States* v. *Louderman*, 576 F.2d 1383, 1387 (9th Cir. 1978); *United States* v. *Reece*, 614 F.2d 1259, 1261-63 (10th Cir. 1980); *United States* v. *Lemire*, 720 F.2d 1327, 1336 (D.C. Cir. 1983).

[12] Even if the instructional conflict were thought to implicate primarily the application of law by the district courts, this Court has in the past granted petitions where there is only a conflict between the decisions of several district courts or the decision of a court of appeals and that of a district court. *See, e.g.*, *Calhoon* v. *Harvey*, 379 U.S. 134, 137 (1964) (granting certiorari because of "the importance of the questions presented and conflicting views in the courts of appeals and the district courts"); *Curtis* v. *Loether*, 415 U.S. 189, 191 n.2 (1974) (citing "evenly divided" district court decisions among the reasons for granting certiorari); *Massachusetts* v. *United States*, 435 U.S. 444, 453 (1978) (citing conflict between a court of appeals decision and a single district court ruling that a state was constitutionally immune from a federal tax); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 646 & n.9 (1981) (granting petition "in light of the important constitutional issues presented and the conflicting results reached in similar cases in various lower courts," citing *inter alia* four differing federal district court rulings); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 (continued...)

## II. REVIEW SHOULD BE GRANTED TO DEFINE THE OUTER BOUNDARIES OF THE PUBLIC'S RIGHT TO THE "HONEST SERVICES" OF GOVERNMENT OFFICIALS.

1. The Eleventh Circuit's decision failed to acknowledge, let alone grapple with, a legal question of extraordinary importance: whether a public official can be convicted of "honest services" mail fraud under § 1346 for lying to the press about her private life -- in this case about an adulterous romance. The worthiness of this issue for review by this Court is made plain by the fact that the summary affirmance of petitioner's conviction could subject virtually every local, state, and federal office holder in the states of the Eleventh Circuit to criminal prosecution for misleading or incomplete statements to the media. This case, in which the issue was clearly preserved and decided and whose facts present the issue in the sharpest imaginable relief, is an excellent vehicle for addressing the outer boundaries of "honest services" fraud liability. This Court -- which has not passed in any depth on § 1346 since its enactment in 1988 -- would advance the law significantly by reviewing this case and deciding whether a politician's misstatement to the press and the public about private behavior is a species of "honest services" mail fraud.

2. "Honest services" mail fraud does not encompass every form of ethical lapse, dishonesty, or even illegal conduct by public officials. See, *e.g.*, *United States* v. *Sawyer*, 85 F.3d 713, 727-30 (1st Cir. 1996) (violations of state gratuity and gift statutes alone do not amount to honest services fraud). Instead,

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[12] (...continued)
n.14 (1981) (citing only four federal district court decisions in support of the grant of certiorari as to an important and recurring issue of punitive damages under a federal statute).

"although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official for honest services fraud cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result." *Id.* at 725. The content of the public's right to "honest services" is not self-defining; decades of judicial interpretation have been required to clarify that only those especially serious forms of misconduct that are calculated to deprive the public of its right to have official decisions made in the public interest amount to schemes to deprive the public of "honest services."[13] Such

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[13] Courts and commentators alike have frequently noted the difficulty of defining these terms. *See, e.g.*, *United States* v. *Bloom*, 149 F.3d 649, 656 (7th Cir. 1998) ("No one can be sure how far the intangible rights theory of criminal responsibility really extends, because it is a judicial gloss on § 1341. Congress told the courts in § 1346 to go right on glossing . . ."); *United States* v. *Brumley*, 116 F.3d 728, 742 (5th Cir.) (en banc) ("The answers to the questions 'What is an intangible right?', 'What are honest services?', and what is 'the intangible right of honest services' are not clear nor is their meaning readily available to the average citizen.") (Jolly and DeMoss, J.J., dissenting), *cert. denied*, 118 S. Ct. 625 (1997); *United States* v. *Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) ("The concept of governmental 'honest services' . . . eludes easy definition"); *see also* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv. J. on Legis. 153, 187-99 (1994); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. Rev. 223, 269-71 (1992). Indeed, in this case, the district court itself appeared to be unsure about the meaning of "honest services" at times:

> Mr. Berenson: [S]omewhere we would like your Honor to instruct the jury what a scheme to defraud of honest services means exactly.
>
> The Court: Well, what is meant by honest services?
>
> Mr. Berenson: Precisely. We don't want the jury to have the impression that if either [defendant] told a lie at some point, that's the scheme charged in count one.

(continued...)

misconduct most commonly takes the form of bribery, see, *e.g.*, *United States* v. *Paradies*, 98 F.3d 1266, 1282 (11th Cir. 1996), *cert. denied*, 118 S. Ct. 598 (1997); *United States* v. *Boots*, 80 F.3d 580, 592-94 (1st Cir. 1996), but it can also include self-interested official decisionmaking resulting from the receipt of kickbacks or the existence of an undisclosed personal financial stake in the outcome of an official decision. See, *e.g.*, *United States* v. *Grandmaison*, 77 F.3d 555, 557-59 (1st Cir. 1996); *United States* v. *Waymer*, 55 F.3d 564, 567 (11th Cir. 1995).

In all cases, however, the touchstone of honest services fraud is "undisclosed, biased decisionmaking for personal gain." *Sawyer*, 85 F.3d at 724. The Fourth Circuit explained, in a pre-*McNally* decision, "[t]he crux of this theory" as follows:

> [T]he fraud involved in the bribery of a public official lies in the fact that the public official is not exercising his independent judgment in passing on official matters. . . . When a public official has been bribed, he breaches his duty of honest, faithful and disinterested service. . . . [T]he official has been paid for his decisions, perhaps without even considering the merits of the matter. Thus, the public is not receiving what it expects and is entitled to, the public official's honest and faithful service.

*United States* v. *Mandel*, 591 F.2d 1347, 1362 (4th Cir.), *aff'd en banc in relevant part by an equally divided court*, 602 F.2d 653 (4th Cir. 1979) (citation omitted).

As this explanation makes clear, "honest services" and "official capacity" have specialized legal meanings that are beyond the common understanding of lay jurors. Indeed, to a lay juror, these terms probably connote the general honesty or

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[13] (...continued)
App. 33a.

dishonesty of a politician; if a politician lies about matters of public or even private concern, even if those lies are unconnected to any official decisionmaking, the average juror would likely feel that the politician has failed to render "honest services" to the public. That is especially true where, as here, the prosecution expressly tells the jury in summation that a politician's failure to disclose facts about her private life in press interviews and conversations with friends and colleagues constitutes a failure to render honest services. See App. 50a ("That disclosure, that revealing of the relationship, that would have been honest services.").

Numerous decisions make clear that conduct of the kind for which petitioner was convicted -- lying to a reporter and others about one's love-life -- does not amount to "honest services" fraud, no matter how ignoble such conduct might be.[14] For example, in *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), the Eighth Circuit reversed the "honest services" mail fraud convictions of a state legislator who had accepted kickbacks in exchange for referring an architectural firm to the state officials responsible for awarding state architectural contracts, because the legislator himself played no official role in awarding the contracts. *Id.* at 1026. The Eighth Circuit explained that while the defendant had obviously acted unethically, and probably transgressed state laws, his conduct had not deprived his constituents of their intangible right to the honest and fair performance of his legislative responsibilities. See *id.* at 1025; see also *United States* v. *McNeive*, 536 F.2d 1245, 1252-53 (8th Cir. 1976) (reversing convictions where

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[14] The legislative history of § 1346 provides further confirmation. Senator Mitch McConnell, who sponsored one of the bills that eventually became § 1346, declared that the statute "would not create federal jurisdiction over such things as false campaign rhetoric and campaign dirty tricks, which are not appropriate subjects for federal prosecution." 134 Cong. Rec. S8055 (daily ed. June 17, 1988) (statement of Sen. McConnell).

plumbing inspector violated city ordinance by accepting gratuities for issuing permits he had no discretion to deny).

Likewise, in *United States* v. *Czubinski*, 106 F.3d 1069 (1st Cir. 1997), the First Circuit reversed the convictions of an employee of the Internal Revenue Service who had violated IRS rules prohibiting employees from conducting unauthorized searches of confidential taxpayer information. *Id.* at 1071-72, 1079. The First Circuit found his behavior beyond the reach of § 1346 because "the government must not merely indicate wrongdoing by a public official, but must also demonstrate that the wrongdoing at issue is intended to prevent or call into question the proper or impartial performance of that public servant's official duties." *Id.* at 1076. Although the defendant in that case "clearly committed wrongdoing in searching confidential information," the convictions were reversed, because "there is no suggestion that he failed to carry out his official tasks adequately, or intended to do so." *Id.* at 1077.

In this case, the effect of the Eleventh Circuit's decision was to allow conviction on an entirely different basis: mere dishonesty. There can be no dispute on this point: the jurors themselves stated publicly that they convicted petitioner of lying to the media, and the jury instructions clearly permitted a conviction on this ground. Nonetheless, the Eleventh Circuit willfully blinded itself to the issues presented to it and to the implications of its own decision. It engaged in highly suspect judging, hiding behind a mute affirmance and a subsequent assault on straw-man arguments. Review of its decision would not only permit this Court to pass upon the important issues of law the Eleventh Circuit tried to bury, but also it would serve as a curb on those courts of appeals that attempt to avoid this Court's exercise of its jurisdiction on certiorari by engaging in decisional contortions.

* * * *

In sum, review of the Eleventh Circuit's judgment is warranted to resolve the conflict in the circuits, to establish national, uniform standards concerning the need to instruct juries about the meaning of "honest services," and to clarify that a public official does not commit "honest services" fraud by lying to the press and the public about matters outside her "official duties."

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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